

#2 Fighting Racial Injustice

YJLC

Racial
Injustice
Series

Police station,
diversion,
CCE, effective
participation,
remand &
sentence



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Youth Justice Legal Centre

Standing up for kids

JUST FOR KIDS



This guide is the second in a three-part series designed to equip practitioners with knowledge and strategies for identifying and challenging racism facing Black, Brown and Racialised children and young adults in the criminal justice system. Developmental maturity is more helpful than chronological age in deciding on the best response to young adults.

Part 1 of this series introduces the overarching principles. Part 2 looks at how to apply the principles in a criminal practice. Part 3 looks specifically at cases involving evidence of gang affiliation in rap and drill music.

This work has been developed in consultation with Black, Brown and Racialised children and young adults, as well as an Advisory Board constituted of predominantly Black, Brown and Racialised expert practitioners.

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The police station

The 1999 Macpherson Report confirmed what Black, Brown and Racialised communities have said for decades: UK police are institutionally racist.¹ Countless examples exist of the systemic racial violence that permeates policing across the country, from the fact that the police use restraint and tasers four times as often on Black people, to Black people being twice as likely to die in police custody than white people.²

This context is vital to informing legal professionals about how Black children in particular experience police stations, and should be central

to how lawyers support them to navigate this racialised environment.

The National Police Chiefs' Council (NPCC) has given guidance on the fact that police officers should avoid arresting children wherever possible and custody should be used as a last resort.³

Child-only custody suites do not exist, meaning that detained children are subjected to adult conditions regardless of their additional rights and entitlements. The young people in our working group told us that there is widespread distrust of anyone in the police building due to their perceived affiliation with police.

“Most of them [the police] are racist”

On arrival

On arrival at the police station, you should review the custody record in full and look out for indications of mistreatment. Be alive to the reality that mistreatment may be rooted in racism, and consider the impact on a child or young adult experiencing it.

Consider the following:

- The child or young adult is most likely to experience racism and trauma during arrest and while in custody.
- Note the length of time between arrest and arrival at the station. Ask the young person about their arrest and transfer to the station – delays can be indicative of issues having arisen.
- Consider the grounds for detention. Is detention really necessary? If not, consider making representations that the young person is released and interviewed at a more appropriate time and location.

- Ascertain whether a strip search has been carried out, as is disproportionately likely for Black, Brown and Racialised young people.⁴ Given how frightening, traumatic and humiliating the experience can be, consider the impact on a child or young adult.⁵ If appropriate, make representations about the necessity and manner in which the search was conducted and ask for them to be recorded.
- Consider whether the young person's basic welfare needs have been met – have they slept, eaten and had their mental and physical health assessed? If you have concerns, ask for these concerns to be recorded.
- Consider who has been notified of the young person's arrest. Have any family members contacted the station? Take note of their details.
- What property was the young person in possession of on arrest and arrival? Are there red flags for exploitation?

Disclosure

In addition to standard disclosure questions, ask the officer for information particularly relevant to Black, Brown and Racialised children and young adults – for example:

- What were the grounds for arrest?
- What are the details / wording of any alleged identification evidence?

- What antecedents or associations are being relied on by the police?
- Is there any body-worn video (BWV) footage to view?

Early identification of any potential racism in an investigation enables you to challenge the proposed evidence from the outset.

1 Sir William MacPherson, 'The Stephen Lawrence Inquiry', February 1999, para 46.1, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf

2 M Frazer-Carroll, 'A brief history of police brutality in the UK', Huck Magazine, 4 June 2020, <https://www.huckmag.com/perspectives/opinion-perspectives/a-brief-history-of-police-brutality-in-the-uk/>

3 'National strategy for police custody', NPCC, p7

4 www.justiceinspectorates.gov.uk/hmiprisonswp-content/uploads/sites/4/2019/01/Metropolitan-Police-Service-Web-2018.pdf

5 'Local child safeguarding practice review: Child Q', City & Hackney Safeguarding Children Partnership (CHSCP), March 2022, <https://chscp.org.uk/wp-content/uploads/2022/03/Child-Q-PUBLISHED-14-March-22.pdf>

Appropriate adults

Appropriate adults are primarily responsible for ensuring the welfare of children in custody. They can be parents, carers, another adult known to the child or, if none of these are available/appropriate, independent volunteers. All appropriate adults carry out a statutorily defined role limited to supporting children in custody and during an interview.⁶

However, when a volunteer appropriate adult is used, they are only present for a small percentage of the time the child is detained – usually not much more than the interview. Often, they do not speak or intervene during the interview and have little meaningful engagement with the child.

When a parent acts as appropriate adult it can bring its own difficulties. Parents bring their own

fears and experiences to the process. Emotions may be running high, the family dynamic may be complicated and external factors – for example, childcare commitments for other children – have an impact.

You should not assume that a child client is being adequately supported by the appropriate adult. You must instead help the child navigate the complex, hostile environment of the police station. Appropriate adults are also likely to feel disenfranchised in the space. You should engage with them, so they become an ally, and perform their role in a more impactful way. You and the appropriate adult both raising the same concern together will be more effective than you raising it alone.

In interview

You should work to ensure that the interview process is adapted to take account of the child's or young adult's age and any communication difficulties they may have. This will involve spending considerable time getting to grips with what the child or young adult is able to understand and how they communicate. You should then negotiate with the police about how they put their questions.

This negotiation can take place in advance of and during the interview.

In addition to all the standard reasons for intervening in interview, consider expressing any concerns about racist comments made, or racist undertones to an officer's language, for the benefit of the tape.

Case study

I was representing a 15 year old boy at the police station. He was accused of having committed a sexual assault in school. During our consultation (before the police interview) he removed his jacket as he was hot. I remember noticing how skinny he looked in his tight white top and how much smaller he was without the jacket.

During the interview one of the officers kept using language to describe the stereotypical predatory Black male:

'You're a big lad' or 'You're very strong'.

The interview was not being video recorded, just audio recorded. I was concerned that a narrative was being created around my client which inaccurate and based in the officer's own bias.

I intervened in the interview as follows:

Defence: 'Your constant reference to my client's physical appearance is of concern to me and I think it is racist.'

Police: 'I didn't use the word Black.'

Defence: 'You don't have to. Clearly what you see when you look at my client is very different to what I see. However, there is no need for you to be referencing his physical appearance.'

The police went on to conduct a second interview with my client in which the original interviewing officer was not present and no reference to my client's physical appearance was made.

⁶ S Paul, 'Tackling racial injustice: Children and the youth justice system', JUSTICE, 2021, p77, at para 4.10 <https://files.justice.org.uk/wp-content/uploads/2021/02/23104938/JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>

Practical advice: building trust prior to interview

If you have asked sufficient questions of the police during disclosure, you may be able to illustrate for the child or young adult that you have already identified racism-related issues. Consider asking your client the following questions to create an opportunity for them to disclose any relevant information:

- Were you restrained when you were arrested?
- Do you have any injuries?
- How have the police treated you?
- Do you feel unwell?
- Have you slept?
- Have you eaten?
- Who else is impacted by you being here?
- Have you spoken to anyone on the phone?
- Do you think that your race, ethnicity or culture have anything to do with why you are here now or what happened today? If so, can you help me to understand why?

While the focus of representation at the police station will be the substantive criminal matter, building sufficient trust is vital to ensuring that all the necessary information can be gleaned from the client to achieve the best possible outcome. You need to be able to acknowledge clients' experiences of racial trauma as part of the process of building trust.

If clients raise any issues of racial trauma, acknowledge the reality of this and validate their experiences. Understand that these experiences may influence their perception of police interactions:

- Acknowledge pain and reinforce strengths: 'I believe you.' 'It's not your fault.'
- Reassure your client that their reactions to trauma are normal and that they can always let you know if they are getting upset and need a break.
- Recognise that although you may be prepared for this conversation, your client may not. And even if they say they are ready, they may not be fully prepared to engage in the conversation. It may take several occasions for them to share and describe experiences that may be filled with pain, shame, anger and a host of other emotions.
- Acknowledge that the issues are complex and that the effects of generations of racism are not going to be fixed in the immediate term.

Police bail

Black, Brown and Racialised children are arrested at a disproportionately high rate to their white peers.⁷ It follows that they are disproportionately refused bail and detained overnight. Police bail decisions for children operate with a different legal framework than those for adults.

Consult the YJLC legal guide on police bail and remand for children⁸ for a comprehensive understanding of the issues.

Some key points and actions on police bail and remand for children and young adults are as follows:

- Insist on being present (in person or on the telephone) at the point the bail decision is being made.
- Be proactive in calling the station, and regularly remind them that you need to be present.
- If the bail decision is made without you, ask the custody sergeant to review the decision and take that opportunity to make representations / propose bail conditions.
- Request an email address from the custody sergeant so that you can also set out your representations in writing.
- Ask the custody sergeant to set out why the proposed bail conditions are not acceptable.
- Ask the custody sergeant for the contact details of the person they have been liaising with on the local authority Emergency Duty Team (EDT). This is the person who will be researching the availability of secure accommodation.
- Contact the EDT (contact details are available on local authority websites) and ask why they don't think the child is suitable for local authority accommodation or what the issue with availability is. If you are not provided with a satisfactory response, request to speak to a manager.
- Inform the custody sergeant that you are liaising with the EDT regarding a placement for the child – a proactive attitude can influence the police response.

7 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, Figure 1.5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

8 December 2021, <https://yjlc.uk/resources/legal-guides-and-toolkits/police-bail-and-remand-children>

Diversion

Diversion schemes have reduced the number of children being formally processed in the CJS, but this has disproportionality benefited white children.⁹ The statistics show that the proportion of first-time entrants from a white background has fallen over the last ten years from 83 per cent to

73 per cent, whereas the proportion of Black first-time entrants has increased from ten per cent to 18 per cent.¹⁰ The proportion of first-time entrants from an Asian background has increased from five per cent to eight per cent over the same period.¹¹

Causes of discrimination in diversion

- Diversion decisions may be based on Black, Brown and Racialised children and young adults being perceived as presenting a higher risk of re-offending and becoming disentitled on this basis.¹²
- Distrust between Black, Brown and Racialised young people and their lawyers and/or the police, results in them being less likely to make the 'admission' necessary to unlock particular forms of diversion.¹³
- Diversion decisions may be based on the perception that Black, Brown and Racialised young people have offended due to negative personality traits, in contrast with white children who are more likely to be perceived as having offended due to environmental reasons.¹⁴
- Access to diversion is reliant on a 'post code lottery' – some areas require an admission of guilt to be eligible for a diversion scheme, while others do not. Some areas don't have programmes available at all, or where they do exist, they are either ineffective or culturally inappropriate. The demographic of any given area will therefore lead to racially divergent outcomes.¹⁵
- There is heavier policing of Black young people, resulting in repeat offences being recorded and thereby creating barriers to eligibility for diversion.¹⁶
- Gypsy, Roma and Traveller children may not be offered diversion due to the racist and erroneous belief that they would not complete the relevant course for reasons related to their lifestyle.¹⁷
- Discrimination in diversion may result from a lack of knowledge about diversion among professionals, including legal representatives.¹⁸

'When you're in the police station, you got two words to say: NO COMMENT.'

Out-of-court disposals

Out-of-court disposal (OCD) is a term for outcomes given to children as alternatives to being charged and prosecuted for a criminal offence.

- 9 'Racial disproportionality, children and young people in custody (part 1): Entry into the youth justice system', House of Commons, Justice Committee, 12 November 2020, para 75, <https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/306/30602.htm>
- 10 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, para 2.2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf
- 11 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, para 2.2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf
- 12 Cited in 'Disparities in youth diversion – an evidence review', Centre for Justice Innovation, January 2021, taken from: S Steen, CEW Bond, GS Bridges, and CE Kubrin., 'Explaining assessments of future risk. race and attributions of juvenile offenders in presentencing reports', in 'Our children, their children: confronting racial and ethnic differences in American juvenile justice', 245–269, edited by F Darnell, DF Hawkins and K Kempf-Leonard, University of Chicago Press
- 13 S Paul, 'Tackling racial injustice: children and the youth justice system', JUSTICE, February 2021, para 3.29, <https://files.justice.org.uk/wp-content/uploads/2021/02/23104938/JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>
- 14 S Paul, 'Tackling racial injustice: children and the youth justice system', JUSTICE, February 2021, paras 3.27 and 3.29, <https://files.justice.org.uk/wp-content/uploads/2021/02/23104938/JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>
- 15 S Paul, 'Tackling racial injustice: children and the youth justice system', JUSTICE, February 2021, p62, para 3.31, <https://files.justice.org.uk/wp-content/uploads/2021/02/23104938/JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>
- 16 A Ofori, B Jolaoso, C Robin-D'Cruz, S Whitehead, 'Equal diversion? Racial disproportionality in youth diversion', Centre for Justice Innovation, March 2021, p12, <https://justiceinnovation.org/publications/equal-diversion-racial-disproportionality-youth-diversion>
- 17 S Paul, 'Tackling racial injustice: children and the youth justice system', JUSTICE, 2021, pp45-46, para 2.62, <https://files.justice.org.uk/wp-content/uploads/2021/02/23104938/JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>
- 18 A Ofori, B Jolaoso, C Robin-D'Cruz, S Whitehead, 'Equal diversion? Racial disproportionality in youth diversion', Centre for Justice Innovation, March 2021, p12, <https://justiceinnovation.org/publications/equal-diversion-racial-disproportionality-youth-diversion>

Overview

Common informal diversion outcomes

Disposal	Description
Triage	<ul style="list-style-type: none">A process by which children can be dealt with informally by the police/YOT.Recorded as 'no further action'.¹⁹
Community resolution / youth restorative disposal	<ul style="list-style-type: none">The resolution of a minor offence or 'anti-social behaviour' incident through informal agreement between the parties involved.Example: child agrees to clean graffiti and write a letter of apology to the victim.
Outcome 21	<ul style="list-style-type: none">This outcome code allows for a crime to be recorded as having taken place and for no formal criminal justice action to be taken. The wording recorded on the Police National Computer (PNC) is: 'Further investigation to support formal action not in the public interest (police decision) (from January 2016)'²⁰Often used in consensual 'sexting' cases.
Outcome 22	<ul style="list-style-type: none">This outcome code is used when the police defer prosecution until the accused has been given the opportunity to engage with an intervention activity. The wording recorded on the PNC is: 'Diversionary, educational or intervention activity, resulting from the crime report, has been undertaken and it is not in the public interest to take any further action (voluntary from April 2019)'²¹Often appropriate to get a young person to engage with an activity, without restoring to a formal disposal in the form of a youth conditional caution (see below).

Formal diversion

Disposal	Description
Youth caution	<ul style="list-style-type: none">A formal warning issued by the police and mandatory referral to YOT.Statutory criteria: ss66ZA and 66ZB Crime and Disorder Act 1998.Statutory guidance has been published jointly by the MOJ and YJB and is endorsed by the Association of Chief Police Officers and (ACPO) the Crown Prosecution Service (CPS).²²
Youth conditional caution	<ul style="list-style-type: none">A youth caution with conditions attached and consequences for non-compliance.Statutory criteria: ss66A and 66B Crime and Disorder Act 1998.Statutory guidance has been published by the MOJ.²³

19 'How to use out-of-court disposals: section 1 case management guidance', YJB, 1 May 2019, para 2.2, www.gov.uk/government/publications/how-to-use-out-of-court-disposals/how-to-use-out-of-court-disposals-section-1-case-management-guidance

20 'Crime outcomes in England and Wales: year ending March 2021', Home Office, published 22 July 2021, Table 1.1, www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2020-to-2021/

21 'Crime outcomes in England and Wales: year ending March 2021', Home Office, published 22 July 2021, Table 1.1, www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2020-to-2021

22 'Youth out-of-court-disposals: guide for police and youth offending services', MOJ and YJB, 2013, www.gov.uk/government/publications/youth-out-of-court-disposals-guide-for-police-and-yots

23 'Code of practice for youth conditional cautions: Crime & Disorder Act 1998 (as amended by the Criminal Justice & Immigration Act 2008 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012)', MOJ, March 2013, www.gov.uk/government/publications/code-of-practice-for-youth-conditional-cautions

OOCs: key points

- All OOCs require an admission of guilt.²⁴
- There is no limit to the number of OOCs a child can receive.²⁵
- Previous convictions are not a bar to receiving an OOC.²⁶
- Offences with an ACPO gravity score of three or below, or with a higher gravity score and mitigating factors, should always be considered for diversion.²⁷
- There is a plethora of guidance for the police, CPS and YOT to consider when deciding whether to divert a child, including:
 - CPS legal guidance, 'Youth offenders'²⁸
 - YJB and MOJ, 'Youth out-of-court disposals: guide for police and YOTs'²⁹
 - YJB, 'How to use out-of-court disposals: section 1 case management guidance'.³⁰
- No youth cautions, youth conditional cautions, reprimands or warnings will be automatically disclosed on standard or enhanced criminal record checks.³¹
- On enhanced criminal record checks, the police have a discretion to disclose any non-conviction information from the PNC which they consider to be relevant.³² The over-policing of Black, Brown and Racialised children and young adults means there is more data held about them on the PNC and therefore puts them at higher risk of this occurring.

Practical advice: out-of-court disposals

Pre interview

Ensure that you have explored the potential for an OOC with the police at the point of pre-interview disclosure.

Ensure that your client understands:

- all the potential outcomes
- the strengths and weaknesses of the evidence
- how their instructions impact on the prospect of a successful defence
- that you are required to advise them about all their options, including the benefits of making admissions where warranted
- that your advice is not based on disbelief, or not wanting to put in the work to defend them, but on your desire to secure the best possible outcome based on the evidence
- the rules around criminal records and how different outcomes may impact the likelihood of the police disclosing the record in the future.³³

Be open with your client about the findings that Black, Brown and Racialised children and young adults are less likely to receive OOCs, in large part because they do not trust the system enough to make the necessary admissions. Explain that you do not want them to lose the opportunity to benefit from an OOC as a result of a lack of trust.

24 'Prosecution and case management: Justice outcomes: Possible justice outcomes following investigation', College of Policing Authorised Professional Practice (APP), published 23 October 2013, last modified 24 March 2022, www.app.college.police.uk/app-content/prosecution-and-case-management/justice-outcomes/. For a conditional caution, the child must not deny the offence rather than make an admission – see 'Conditional cautioning: youths – Director of Public Prosecutions (DPP) guidance', Crown Prosecution Service, updated 5 November 2019, para 9.2, <https://www.cps.gov.uk/legal-guidance/conditional-cautioning-youths-dpp-guidance>

25 'Youth out-of-court disposals: guide for police and youth offending services', MOJ and YJB, 2013, p13, para 4.7, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/438139/out-court-disposal-guide.pdf (the guidance is currently under review and a new version is expected)

26 'Youth out-of-court disposals: guide for police and youth offending services', MOJ and YJB, 2013, p14, para 4.11, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/438139/out-court-disposal-guide.pdf (the guidance is currently under review and a new version is expected)

27 'ACPO youth offender case disposal gravity factor matrix', ACPO, March 2013, para 15.0, available at: <https://yjlc.uk/resources/legal-terms-z/acpo-gravity-matrix>

28 'Legal guidance: Youth offenders', CPS, updated 28 April 2020, www.cps.gov.uk/legal-guidance/youth-offenders

29 'Youth out-of-court disposals: guide for police and youth offending services', MOJ and YJB, 2013, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/438139/out-court-disposal-guide.pdf (the guidance is currently under review and a new version is expected)

30 May 2019, www.gov.uk/government/publications/how-to-use-out-of-court-disposals/how-to-use-out-of-court-disposals-section-1-case-management-guidance

31 'DBS filtering guide', Disclosure and Barring Service (DBS) and MOJ, updated 19 November 2020, www.gov.uk/government/publications/dbs-filtering-guidance/dbs-filtering-guide

32 R (AR) v Chief Constable of GMP [2018] UKSC 47

33 See 'Unlock: For people with criminal records', <https://unlock.org.uk/> for detailed guidance which can be useful to share with clients

Post interview

Post interview, make written representations. These should include:

- statistics / research (see above on racial disproportionality)
- admissions (or if lack thereof, an explanation as to why)
- consideration of possible 'adultification'
- putting the child's behaviour into context: re-frame them as children
- addressing youth, immaturity and personal circumstances
- including supportive evidence: psychiatric/psychological reports, character references, education, employment etc
- reference to the 'ACPO youth gravity matrix'³⁴
- reference to international and domestic legislation and guidance against the criminalisation of children and young adults³⁵
- reference to CPS guidance on youth offenders³⁶
- reference to 'The national protocol on reducing unnecessary criminalisation of looked-after children and care leavers'³⁷
- reference to 'The national protocol on reducing the criminalisation of BAME children and young adults'³⁸
- ensuring familiarity with local diversion schemes:
 - speak to the police and YOT and find out what is available
 - advocate for the best option in any representations
 - follow up / chase the best outcome.

Remember that OOCs can still be considered once the case reaches the youth court, by referring it back to the police.

³⁴ 'ACPO youth offender case disposal gravity factor matrix' available at: <https://yjlc.uk/resources/legal-terms-z/acpo-gravity-matrix>

³⁵ See s37 Crime and Disorder Act 1998; s11 Children Act 2004; arts 3(1) and 40(3) United Nations Convention of the Rights of the Child

³⁶ 'Legal guidance: Youth offenders', CPS, updated 28 April 2020, www.cps.gov.uk/legal-guidance/youth-offenders

³⁷ Department for Education, Home Office and MOJ, November 2018, www.gov.uk/government/publications/national-protocol-on-reducing-criminalisation-of-looked-after-children

³⁸ This is currently being drafted.

Child criminal exploitation

Criminal exploitation is particularly pertinent for Black, Brown and Racialised children and young adults. Victims of exploitation need to be recognised as victims, not treated as perpetrators.

YJLC's legal guide³⁹ on child criminal exploitation (CCE) explains the relevant legal framework, helps practitioners identify when child suspects are potential victims, and know what steps to take next.

Key points

- CCE 'occurs where an individual or group takes advantage of an imbalance of power to coerce, control, manipulate or deceive a child ... The victim may have been criminally exploited even if the activity appears consensual. Child Criminal Exploitation does not always involve physical contact; it can also occur through the use of technology'.⁴⁰
- 'Child trafficking' is defined as the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.⁴¹ Therefore, victims of CCE can also be defined as victims of trafficking (VoTs).
- CCE was first recognised as occurring within 'county lines' drug-dealing operations. 'County lines' was originally the term used to describe gangs involved in exporting illegal drugs within the UK, using dedicated mobile phone lines. The gangs exploited children to move and store the drugs, using coercion, intimidation and violence.⁴²
- The face of county lines is constantly evolving, and the COVID-19 pandemic had an impact on operations.⁴³ The county lines model is shifting towards more traditional forms of modern slavery in which child and adult victims are used as commodities. Points to note:
 - the activity is becoming more localised, and children are being exploited into committing crime close to home
 - the criminal activity has moved beyond drug supply into a range of illegal economies
 - children are being sold by exploiters onto different county lines networks
 - sometimes there is no grooming – young people are approached on the street and immediately taken to county lines locations.
- Where it is believed that a young person is a VoT, they should be referred to the National Referral Mechanism (NRM).⁴⁴ The competent authority will then decide whether they have reasonable grounds to believe the child is a victim of trafficking, and if so, will determine whether they have conclusive grounds of the same. It is crucial that lawyers are aware of the trafficking indicators⁴⁵ as well as the NRM processes, as evidence of trafficking is material to any defence raised under s45 Modern Slavery Act 2015.
- A positive conclusive grounds decision, along with other evidence of exploitation, can be used in representations to the CPS, to argue that a case should be dropped before charge, or discontinued on evidential or public interest grounds.

39 November 2021, <https://yjlc.uk/resources/legal-guides-and-toolkits/child-criminal-exploitation>

40 'County lines exploitation: practice guidance for youth offending teams and frontline practitioners', MOJ, published 15 October 2019, updated 6 January 2020, p5, www.gov.uk/government/publications/county-lines-exploitation

41 Article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Note that ss2 and 3 MSA 2015 contain the relevant statutory definitions

42 'Criminal exploitation of children and vulnerable adults: county lines', Home Office, published 11 July 2017, updated 7 February 2020, www.gov.uk/government/publications/criminal-exploitation-of-children-and-vulnerable-adults-county-lines

43 'Covid-19, vulnerability and the safeguarding of criminally exploited children', Dr G Robinson, Dr B Brewster, V Brotherton, Prof Sir B Silverman from the University of Nottingham's Rights Lab, and Prof D Walsh from the De Montfort University School of Law, June 2021. The ongoing project, 'Covid-19 and child criminal exploitation: closing urgent knowledge and data gaps on the implications of pandemic for county lines', is funded by UK Research and Innovation

44 'National Referral Mechanism: guidance for child first responders', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/233310/NRM_child_first_responders_guidance.pdf

45 'Human Trafficking Indicators', United Nations Office on Drugs and Crime (UNODC), www.unodc.org/documents/human-trafficking/HT_indicators_E_LOWRES.pdf and <https://yjlc.uk/resources/legal-guides-and-toolkits/child-criminal-exploitation>

- The Brecani⁴⁶ judgment, approved in AAD,⁴⁷ states: 'The CPS will ordinarily wait to know the outcome of a referral to the Competent Authority before deciding to charge or continue proceedings where it is suggested that the offence was committed because of relevant trafficking or coercive behaviour.' The judgment should not result in increased numbers of VoTs being prosecuted and a positive 'conclusive grounds' decision is critical to defence representations against prosecution. In the VCL judgment,⁴⁸ the European Court of Human Rights (ECtHR) makes it clear that where the SCA has concluded that someone is a VoT, the prosecution should have clear reasons for rejecting the SCA's opinion.
- Expert evidence on trafficking and modern slavery remains admissible at trial in these cases, providing the suitability of the expert is considered and as long as the expert is giving evidence in relation to relevant matters which are outside the knowledge of the jury.⁴⁹

Practical advice: dealing with barriers for victims of trafficking in the CJS

1. Disclosure of information

The problem: Young people may struggle to identify as exploited, victims or vulnerable due to their life circumstances. For example, they may have had to be self-sufficient growing up, or CCE may have been normalised in their community. A primary concern is likely to be being perceived to be a 'snitch' (see Part 1 of this series on this). The cumulative impact of systemic racism makes Black children even less likely to disclose exploitation.

The solution: Building trust with young clients is vital to being able to even broach this issue. Without a trusting and communicative relationship, it will be difficult to identify trafficking indicators. Once exploitation is disclosed, you need to help clients feel safe in telling their story, throughout what can be a long process. Be aware of the real dangers children may face if they disclose exploitation. Lawyers representing Black, Brown and Racialised young people must practise with sensitivity, care and cultural competence.

2. Written representations to the police/CPS

The problem: Early defence representations are essential in advocating for charges not being brought, a prosecution not being pursued or a deferral of decision making. A positive reasonable or conclusive grounds decision is not necessary to make representations, although will bolster them. However, there may be limited evidence of trafficking at the early stages to persuade the police/CPS to drop any potential charges.

The solution: Representations should set out a chronology of incidents indicating exploitation and the child's characteristics which make them vulnerable to grooming. Applying the CPS's four-stage test,⁵⁰ you should seek to argue that:

- a) there is reason to believe the child is a victim of trafficking
- b) there is clear evidence of a credible common law defence of duress or
- c) there is clear evidence of a statutory defence under s45 Modern Slavery Act 2015 and
- d) it would not be in the public interest to prosecute.

For further guidance on what to include in effective representations, see the YJLC guide on CCE.

⁴⁶ R v Brecani [2021] EWCA Crim 731 at para 9

⁴⁷ R v AAD, AAH and AAI [2022] EWCA Crim 106

⁴⁸ VCL and AN v UK, App Nos 77587/12 and 74603/12

⁴⁹ Consider the YJLC guide, 'Instructing an expert: a toolkit for lawyers and expert witnesses in criminal cases involving children', <https://yjlc.uk/resources/legal-guides-and-toolkits/instructing-expert-toolkit-lawyers-and-expert-witnesses>

⁵⁰ See the CPS guidance 'Modern Slavery, Human Trafficking and Smuggling', 30 April 2020, www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling

3. Adjournments

The problem: It can be difficult to secure adjournments in cases involving NRM referrals. This is likely to be compounded by the impact of the pandemic on the pre-existing backlog in the criminal courts and post Brecani,⁵¹ there is a misguided reluctance to adjourn in some courts entirely.

The solution: Guidance by the Court of Appeal in *R v D*⁵² makes clear that proceedings should be adjourned for investigation into a defendant's possible status as a VoT before pleas are taken. In Brecani, approved in AAD, the Court of Appeal confirmed that the CPS will ordinarily wait to know the outcome of an NRM referral before deciding to prosecute.⁵³

In VCL, the ECtHR stated that early identification of victims is 'of paramount importance'⁵⁴ for prosecutions to be compliant with Article 4 of the European Convention on Human Rights (ECHR) (prohibition of slavery and forced labour). Therefore, a trafficking assessment should be made by a competent authority before a prosecution decision, which is all the more important in respect of children.⁵⁵ These arguments can be used to make robust adjournment applications.

4. Delays

The problem: Delays for children and young adults in the CJS can have a detrimental impact on their wellbeing and/or result in the deterioration of their mental health.

The solution: You should apply a 'trauma-informed' approach (see Part 1 of this series) and ensure that young clients are clearly communicated with, debriefed and supported throughout the process to mitigate the harmful impact of state failings/delays. Consider the YJLC guides on 'Trauma-informed lawyering'⁵⁶ and 'Turning 18'.⁵⁷

5. Inadmissibility of conclusive grounds decisions as evidence

The problem: In Brecani, confirmed in ADD, the Court of Appeal held that a positive conclusive grounds decision is not admissible at trial. The reasoning for the decision was that the NRM decision-makers, competent authority caseworkers, are not experts within the legal definition and therefore cannot give opinion evidence at trial. In addition, the defence instructed expert was deemed not to have had sufficiently specific expertise or knowledge of the evidence for his evidence to have any value.

The solution: The defence can introduce expert evidence regarding the client's trafficked status at trial. However, they will need to scrutinise the expert's areas of expertise and qualifications before instructing them. The judgment makes it all the more important to ensure that young defendants who may have been exploited are referred to the NRM at the earliest possible stage in proceedings, and that written representations are made as soon as practically possible. Note the conclusive grounds decision is admissible on appeal.⁵⁸

6. Adulthood

The problem: The problems identified in Part 1 of this series regarding how Black children are subject to adulthood are particularly relevant to their positions as victims or potential victims of CCE. Being viewed as more 'adult-like' or 'responsible' for their behaviour may result in them being less likely to be recognised as victims of exploitation by the YOT, the CPS, the courts and even their own defence representatives.

The solution: You should challenge your own implicit biases, as well as the racialised perceptions by the YOT, CPS and courts to ensure that Black children are viewed and treated both as victims and as children when there is evidence of their exploitation by criminal gangs.

Acknowledging the client's age, referring to them by their first name, and adhering to the relaxing of formalities in court (such as remaining seated in the magistrates' courts) can also help to counter adulthood.

51 *R v Brecani* [2021] EWCA Crim 731

52 *R v D* [2018] EWCA Crim 2995

53 At para 9

54 At para 160

55 At para 162

56 April 2021, <https://yjlc.uk/resources/legal-guides-and-toolkits/trauma-informed-lawyering>

57 March 2021, <https://yjlc.uk/resources/legal-guides-and-toolkits/turning-18>

58 *R v AAD, AAH and AAI* [2022] EWCA Crim 106

Effective participation

Institutional racism and adultification can result in Black, Brown and Racialised children being labelled as 'bad' and assigned as having behavioural problems at school. Black boys are four times as likely to be permanently excluded from school,⁵⁹ and the rates are worse for Gypsy and Traveller children. The vast majority of children in detention have been excluded from school.⁶⁰

You need to be aware that young Black, Brown and Racialised clients may well have undiagnosed special educational needs (SEN) or mental health conditions. Lawyers representing children,

particularly those at risk of having additional vulnerabilities which have been overlooked, need to accept there will be extra work necessary to get to the bottom of the potential underlying issues. Request psychological assessments for all children who have trouble giving instructions or who have had periods outside education.

YJLC's legal guide on effective participation and fitness to plead provides detail on navigating the legal framework.⁶¹ YJLC's toolkit on instructing an expert⁶² is also a useful tool in these cases.

Key points

- It is your responsibility to remind the court of the special status given to children in the criminal justice system.⁶³
- Consider:
 - whether the young person is fit to plead
 - whether the young person can effectively participate and
 - what modifications or special measures may be necessary to ensure their participation.
- A trial in which a young defendant cannot effectively participate may amount to a breach of their Article 6 ECHR rights (right to a fair trial).
- To enable 'effective participation', which includes 'the right to hear and follow proceedings', the Judicial College Equal Treatment Bench Book (ETBB)⁶⁴ states that the defendant needs to:
 - be informed clearly and in detail, and in language which they can understand, of the nature and cause of the accusation against them
 - have a broad understanding of the trial process and what is at stake
 - be able to understand the general thrust of what is said in court
 - be able to understand what is said by the prosecution witness and be able to point out to their own lawyers any statement with which they disagree.⁶⁵
- How this is practically applied can be guided by relevant case law, in the ECtHR⁶⁶ and in the domestic courts.⁶⁷ This includes:
 - keeping the young person's level of cognitive functioning in mind
 - using concise and simple language
 - having regular breaks
 - taking additional time to explain court proceedings
 - being proactive in explaining and ensuring that the young person understands the ingredients of the charge
 - explaining the possible outcomes and sentences and
 - ensuring that cross-examination is carefully controlled so that questions are short and clear and frustration is minimised.

59 F Demie, 'The experience of Black Caribbean pupils in school exclusion in England', *Educational Review*, vol 73, 2021, issue 1, 24 April 2019

60 'Annual Report 2017-18', HM Chief Inspector of Prisons for England and Wales, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761589/hmi-prisons-annual-report-2017-18-revised-web.pdf

61 'Effective participation and fitness to plead', October 2021, <https://yjlc.uk/resources/legal-guides-and-toolkits/effective-participation-and-fitness-plead>

62 'Instructing an expert: a toolkit for lawyers and expert witnesses in criminal cases involving children', <https://yjlc.uk/resources/legal-guides-and-toolkits/instructing-expert-toolkit-lawyers-and-expert-witnesses>

63 The parties are under a duty to alert the court to any 'potential impediment to the defendant's effective participation in the trial': Criminal Procedure Rules (CrimPR) 3.3(2)(f), inserted by Criminal Procedure (Amendment) Rules 2021 SI 2021/40

64 2021, www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/; see also the Youth Court Bench Book, June 2020, www.judiciary.uk/publications/youth-court-bench-book-and-pronouncement-cards/

65 ETBB, Chapter 4, p133, para 116

66 SC v UK [2004] ECHR 263

67 R (TP) v West London Youth Court [2005] EWHC 2583 (Admin) at para 36

- Argue for modifications as suggested by experts such as psychologists, speech and language therapists or other professionals who know the child. Familiarise yourself with the available modifications as set out in the Criminal Practice Directions (CrimPD) 3G⁶⁸ while bearing in mind these are not exhaustive and the court retains an inherent power at common law to make any modifications necessary to ensure a young person's effective participation.⁶⁹
- You can also argue the welfare duty⁷⁰ and 'best interests'⁷¹ to support applications for any modifications to the court process that are necessary to ensure the young person's effective participation and mitigate their experiencing intimidation or distress.
- The court is under a duty to take 'every reasonable step' to encourage and facilitate the participation of any person.⁷²

68 Criminal Practice Directions – Division I: General Matters – 3G Vulnerable defendants, www.gov.uk/guidance/rules-and-practice-directions-2020

69 R (C) v Sevenoaks Youth Court [2009] EWHC 3088 (Admin); R (D) v Camberwell Youth Court [2005] UKLH 4.

70 s44(1) Children and Young Persons Act 1933

71 'Standards for children in the youth justice system 2019', YJB and MOJ, February 2019, www.gov.uk/government/publications/national-standards-for-youth-justice-services

72 CrimPD 3D.2

Remand and sentencing

Disparity

Black, Brown and Racialised children are remanded more frequently and for longer periods of time than white children. They also receive harsher and longer sentences than their white counterparts.

This is evident from the following:

- All Black, Brown and Racialised groups were more likely to receive custodial remand and less likely to receive community remand compared to white children.⁷³
- In almost all cases, Black, Asian and Mixed ethnic groups were more likely to receive harsher sentences than white children.⁷⁴
- In 2020/21, more than half of children in custody were from Black, Brown or Racialised backgrounds – with 29 per cent being Black,⁷⁵ despite Black children only making up four per cent of the general 10- to 17-year-olds in the 2011 population.⁷⁶

How to challenge racial disparity in remand and sentencing decisions

1. Advance race in decisions on bail and bail conditions

The prosecution may oppose bail on grounds which are informed by unconscious bias and/or racial stereotypes. Listen carefully to the prosecutor's wording and tone. For example, are references to the young person's associates, the location of their home or description of their education status presented in a manner indicating bias or racial stereotyping? These prejudices may inform fears regarding the commission of further offences, interfering with witnesses and failing to surrender. Decision-makers may also make bail decisions and impose bail conditions on the basis of similar assumptions.

You should challenge these racist narratives, even if they are unconscious:

- check and if necessary enhance your own cultural competence
- make arguments based upon the particular circumstances of the young person's life, informed by the young person's voice
- provide an unbiased and properly informed consideration of risk factors and mitigate accordingly
- explicitly rebut arguments premised on racial bias.

One way you can illuminate any differential treatment (to yourself and subsequently to the court) is to give thought to experiences of similar cases where their client was white, how the prosecution framed objections (if they did), and how they dealt with that client.

2. Challenge discriminatory risk assessments

In 2021, HM Inspectorate of Probation (HMIP) inspectors found 'significant deficits' in the quality of work conducted by youth offending

services and partner agencies with Black and mixed heritage boys.⁷⁷ The AssetPlus assessment tools created by the YJB in 1999 and used by YOTs

73 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, Figure 7.7, p41, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

74 'Ethnic disproportionality in remand and sentencing in the youth justice system', YJB, 21 January 2021, p9, para 17, www.gov.uk/government/publications/ethnic-disproportionality-in-remand-and-sentencing-in-the-youth-justice-system

75 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, Figure 7.6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

76 'Youth Justice Statistics, 2020/21, England and Wales', YJB and MOJ, 27 January 2022, para 1, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054236/Youth_Justice_Statistics_2020-21.pdf

77 'A thematic inspection of the experiences of black and mixed heritage boys in the youth justice system', HMIP, 21 October 2021, www.justiceinspectorates.gov.uk/hmiprobation/inspections/black-and-mixed-heritage-boys/

to measure a defendant's risk of reoffending, are acknowledged to be racially biased.⁷⁸ Black children are assessed as riskier than children of any other ethnicity – a trend that cannot be explained by offence-related or demographic factors.⁷⁹ You should consider:

- ensuring that you can obtain the AssetPlus – this is often not readily available at court and you may need to formally request it
- providing the YOT with accurate and up-to-date information about the child
- providing evidence of the racially biased elements of AssetPlus, once received
- inviting the YOT to comment on where the risk assessment tool is racially biased – it was not created by them but by the YJB
- challenging an adverse risk assessment by YOT/probation by calling the reporting officer to give evidence as to the formula engaged to assess risk
- assessing whether it would be appropriate to commission an independent assessment of risk, for instance by a psychologist, independent social worker or probation officer – however, note that any engagement in the 'risk' narrative can be counterproductive, particularly if independent reports are adverse to the client's interests, so this tactic may only be useful in certain cases
- presenting the sentencing court with the research pointing to racial discrimination at sentence.

3. Challenge adultification⁸⁰

Counter a sense of adultification of Black, Brown and Racialised children and young adults by practising the following:

(a) Challenge adultification in the pre-sentence report

- Challenge language which adultifies children and ask for the report to be amended.
- Call the YOT/probation officer to give evidence and justify their use of this language.
- Challenge the language of the prosecutor or the decision-maker if it contains racially motivated connotations – even if these might appear subconscious.
- Invite the court to scrutinise the pre-sentence report for racial bias.
- Place what may appear to be 'pro-criminal' choices in their wider context. For example, so-called gang associates/affiliations. It is critical that the court understands that engaging with gangs or members of so-called gangs may be essential to everyday survival in the area where the client resides and/or that gang members are not always engaged in criminal conduct. They typically play sport, go to school and socialise in the same places where the client does, so contact is often inevitable.
- When challenging a pre-sentencing report, frame any areas of concern first with a recognition that YOT/probation have a challenging role, and that their role and efforts in completing the report are graciously received. An un-tempered critique of the report is unlikely to be received well by the court.

(b) Commission an independent psychological report

The report should address the defendant's youth, vulnerability, emotional and developmental needs.

An opinion should be sought on general matters such as:

- level of maturational development
- cognitive ability
- mental health
- family background.

An opinion should be sought on sentence-specific matters including:

- antecedent history, and whether any conclusions as to risk of reoffending and emotional maturity may be drawn from this background
- the offence(s) in question, and whether the facts speak of an enhanced level of emotional maturity and/or risk of reoffending.

The expert's view on a suitable disposal and in particular what an appropriate community sentence would look like and the benefits of this approach.

(c) Ensure that any pejorative, adult labelling is challenged during your plea in mitigation and that simple language is used both so the child can follow and to remind the court they are sentencing a child

⁷⁸ See, for example, T Almond, 'Asset: An assessment tool that safeguards or stigmatizes young offenders?', *Probation Journal*, vol 59(2), June 2012, p142

⁷⁹ 'Youth Justice Statistics: 2019 to 2020', YJB and MOJ, 2021, www.gov.uk/government/statistics/youth-justice-statistics-2019-to-2020; and 'Ethnic disproportionality in remand and sentencing in the youth justice system: analysis of administrative data', YJB, 2021

⁸⁰ See definition in Part 1 of this series

4. Ensure judicial acceptance of community-based character referees

Sentencing courts may be reluctant to accept character evidence, especially if given by community leaders from Black, Brown and Racialised communities.

Take written statements or letters of support. Consider calling a character referee to give sworn evidence. The ability of the sentencing judge to

test the evidence may allay judicial concern about the evidence.

Also robustly challenge any suggestion that this evidence is not legitimate based on racial assumptions and/or prejudices about Black, Brown and Racialised communities.

5. Advance race as mitigation

Always consider raising a child or young adult's race as part of mitigation – see below for advice on doing so. Discuss the strategy with your client and ensure that you have their consent.

Consider presenting the research and guidance relating to: disproportionality in OODC,

remand and sentencing outcomes, and the disparity of experience and inherent racism of the CJS towards Black, Brown and Racialised children and young adults.

Practical advice: race as mitigation

Using race in mitigation involves:

- reminding the sentencing court of the racism that underlies disproportionality in outcomes for Black, Brown and Racialised children and young adults and
- emphasising that it is just and appropriate for the court to take steps to reduce this disparity through the disposal imposed.

Ensure that the sentencing court is reminded of the following judicially-endorsed principles:

- The Sentencing Council's overarching guideline on sentencing children and young adults⁸¹
 - Black, Brown and Racialised children are over-represented in the youth justice system.
 - Decisions about the welfare of a child or young adult must consider the particular factors that arise in the case of Black, Brown and Racialised young people.⁸²
- The Sentencing Council's overarching guideline on sentencing offenders with mental disorders, developmental disorders, or neurological impairments⁸³
 - Courts should be aware of relevant cultural and 'ethnic' considerations of offenders within a mental health context.
 - Black, Brown and Racialised people may be more likely to enter mental health services via the courts or the police rather than primary care.
- The Sentencing Council's guideline on supplying or offering to supply a controlled drug / possession of a controlled drug with intent to supply it to another⁸⁴
 - Black, Brown and Racialised defendants are much more likely to receive an immediate custodial sentence than white defendants.⁸⁵

81 'Sentencing children and young people: Overarching principles and offence specific guidelines for sexual offences and robbery – Definitive Guideline', Sentencing Council, 2017, www.sentencingcouncil.org.uk/publications/item/sentencing-children-and-young-people-definitive-guideline/

82 Para 1.18

83 'Overarching principles: sentencing offenders with mental disorders, developmental disorders, or neurological impairments', Sentencing Council, 2020, para 5, www.sentencingcouncil.org.uk/publications/item/overarching-principles-sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments-final-resource-assessment/

84 'Supplying or offering to supply a controlled drug/ possession of a controlled drug with intent to supply it to another', Sentencing Council, 1 April 2021, www.sentencingcouncil.org.uk/offences/magistrates-court/item/supplying-or-offering-to-supply-a-controlled-drug-possession-of-a-controlled-drug-with-intent-to-supply-it-to-another/

85 Sentencing Council, 'Ethnicity data: what we have and how we use it in developing guidelines', 24 June 2021, www.sentencingcouncil.org.uk/news/item/ethnicity-data-what-we-have-and-how-we-use-it-in-developing-guidelines/, referencing Sentencing Council, 'Investigating the association between an offender's sex and ethnicity and the sentence imposed at the Crown Court for drug offences', 15 January 2020, www.sentencingcouncil.org.uk/publications/item/investigating-the-association-between-an-offenders-sex-and-ethnicity-and-the-sentence-imposed-at-the-crown-court-for-drug-offences/

- The Sentencing Council's guidelines for firearms offences⁸⁶
 - Black defendants are more likely to receive an immediate custodial sentence than white defendants.⁸⁷
- The Judicial College Equal Treatment Bench Book⁸⁸
 - Acknowledgement of disproportionate outcomes for people from Black, Brown and Racialised backgrounds.⁸⁹
 - Recommends:⁹⁰
 - › building trust with clients who may have had bad experiences with the CJS
 - › scrutinising evidence provided by other agencies for bias
 - › challenging representations of young Black people which overstate their risks and overlook their vulnerabilities and
 - › bearing in mind that Black, Brown and Racialised young people may have experienced criminal exploitation.

'They just see the next Black youth ... and when you do that you're going to judge them, you're going to give them a stereotype ... It's just another Black kid. Yeah, just send him to prison.'

Sentencing remarks

The primary focus of a child's sentencing hearing should be rehabilitation.⁹¹ Section 37 of the Crime and Disorder Act 1998 makes clear that the principal aim of the youth justice system is to prevent offending by children and young people, and s44 of the Children and Young Persons Act 1933 sets out that every court shall have regard to their welfare.

Research conducted by Professor Kathryn Hollingsworth has pointed to the capacity of a sentencing hearing to fulfil a wider, more holistic objective.⁹² Professor Hollingsworth's research identifies two problems that can be solved by the innovative approach set out below:

1. The majority of children report a negative experience of sentencing: high anxiety, low understanding, and that they do not feel 'seen' or understood.

2. Poorly written/delivered sentencing remarks lead to lack of trust and may impact compliance.

Approaching the delivery of sentencing remarks by bringing into effect sentencing principles, procedural justice principles and relational communication principles⁹³ may achieve the following benefits:

- an increase in the young person's understanding of the outcome and ability to contribute to future decision-making (eg any appeal)
- an increase in the young person's trust in the CJS
- helping the young person's reintegration into society
- influencing the sentence to achieve better outcomes for children.

⁸⁶ Sentencing Council, published 9 December 2020 and coming into force 1 January 2021 www.sentencingcouncil.org.uk/sentencing-and-the-council/about-sentencing-guidelines/about-published-guidelines/firearms-offences/

⁸⁷ YJLC, <https://yjlc.uk/resources/legal-updates/new-sentencing-guidelines-firearms-offences-published>

⁸⁸ 2021, www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/; see also the Youth Court Bench Book, June 2020, www.judiciary.uk/publications/youth-court-bench-book-and-pronouncement-cards/

⁸⁹ Paras 185–201

⁹⁰ Paras 202–203

⁹¹ Sentencing Council, para 1.2, www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/#Section%20one:%20General%20approach

⁹² Professor K Hollingsworth (Newcastle University) 'Sentencing remarks for children: a new approach', Newcastle Law School Research Briefing No 14; and "'This is a case about you and your future': Towards judgments for children' (2020) 83(5) Modern Law Review 1030–1058

⁹³ See in Part 1 of this series

What role can practitioners play?

Practitioners should advocate for the sentencing court to deliver sentencing remarks that fully incorporate the following principles. This could be done in oral submissions by representatives on conviction or at the beginning of a sentencing hearing:

1. Law relating to sentencing principles

- Domestic and international law⁹⁴ and guidance⁹⁵ requires the delivery of sentencing remarks in ordinary language that is capable of being understood by the young person.
- In practice, this means the delivery of sentencing remarks that:
 - ensure that the young person understands the sentence passed
 - are clear
 - have an individualised and language, tone, and structure
 - are conducive to the young person's welfare and reintegration.

2. Relational communication principles⁹⁶

- A relational communication style involves:
 - explaining the judge's role
 - checking that the information given to the court does not include stigmatising or discriminatory language
 - stressing the child's status as a child and the child's capacity for change
 - ensuring that the court is aware of the young person's accomplishments, strengths, ambitions etc.

The sentencing judge should be asked to incorporate all these principles in the sentencing remarks.

- Focus on the young person's future
Young people respond positively to being given hope either in the form of a second chance or encouraging comments about what they might achieve in their future lives.⁹⁷
- Ensure sentencing remarks are accessible to young people.

The case has been made for judgments to be written in such a way that is accessible for children and young adults: to adopt a child-centred approach to decision-making and promote young people's access to justice.⁹⁸ Sir Peter Jackson's judgment in *Re A* (letter to a young person), a decision from the family court, is notable in this regard.⁹⁹

You should consider whether to invite the court to provide the sentencing remarks in such a format, for instance by letter or pictorially, citing the requirement to meet the relevant sentencing principles for children outlined at point 1 above. Written representations could be of assistance.

Where the sentencing remarks are not written in an accessible way, a child-focused approach can be achieved where the young person is able to react and reflect on them in a less intense environment than the courtroom. This may involve you sitting with child clients after sentencing hearings and taking them through the remarks and carefully explaining decisions and reasons at each point.

⁹⁴ Article 6(1), European Convention on Human Rights; General Comment No 24 (2019) 'Children's Rights in the Child Justice System' (replacing General Comment No 10 (2007)); 'Children's Rights in Juvenile Justice' para 57; and General Comment No 12 (2009) 'The right of the child to be heard', para 28; *V v UK*; *T v UK* (1999) 30 EHRR 121; *Taxquet v Belgium* (Grand Chamber) (2012) 54 EHRR 26; and *Seryavin and others v Ukraine*, App No 4909/04, [2011] ECHR 255, which required not only that reasons be given but that they be given clearly.

⁹⁵ Magistrates' Courts (Children and Young Persons) Rules 1992 SI 1992/2071 rule 6(1) and (2) (Part II, applies to criminal proceedings); Youth Court Bench Book, June 2020, www.judiciary.uk/publications/youth-court-bench-book-and-pronouncement-cards/; 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice', Council of Europe, 2010. For a brief discussion of how guidance on child-friendly justice has evolved, see H Stalford, L Cairns and J Marshall, 'Achieving child friendly justice through child friendly methods: let's start with the right to information' (2017) 5 Social Inclusion 207, 207–208

⁹⁶ See in Part 1 of this series

⁹⁷ H Stalford, K Hollingsworth, "'This case is about you and your future': towards judgments for children", *Modern Law Review*, vol 83, issue 5, 14 May 2020, pp1030–1058

⁹⁸ H Stalford, K Hollingsworth, "'This case is about you and your future': towards judgments for children", *Modern Law Review*, vol 83, issue 5, 14 May 2020, pp1030–1058

⁹⁹ *Re A* (letter to a young person) [2017] EWFC 48

#02

Fighting Racial Injustice: Police station, diversion, CCE, effective participation, remand & sentence

Written by Zehrah Hasan (Garden Court Chambers) in collaboration with the Youth Justice Legal Centre. Thank you to the young people who generously shared their experiences with us. Thank you to our expert advisory board: Aika Stephenson, Garry Green, Junior Smart, Sandra Paul, Kusai Rahal, Danielle Manson, Alexandra Wilson and Keir Monteith QC.



#01
Background,
childhood, legal
representation &
trauma

#02
Police station,
diversion, CCE,
effective
participation,
remand &
sentence

#03
Rap & drill

Youth Justice Legal Centre

yjlc.uk

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

The Barrow Cadbury Trust

barrowcadbury.org.uk

The Barrow Cadbury Trust is an independent, charitable foundation committed to bringing about a more just and equal society. Charity number: 1115476



Standing up for kids
JUST FOR KIDS

